National Energy Board | Office national de l'énergie

Reasons for Decision

Trans Mountain Pipeline ULC

RH-001-2012

May 2013

Tolls and Tariff

Canada

National Energy Board

Reasons for Decision

In the Matter of

Trans Mountain Pipeline ULC

Application pursuant to Part IV
of the *National Energy Board Act* for approval
of the transportation service to be provided and
the toll methodology to be applied on a future
expanded Trans Mountain Pipeline System

RH-001-2012

Toll Order TO-004-2013

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Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (NEB Act) and the Regulations made thereunder; and

IN THE MATTER OF an application dated 29 June 2012 by Trans Mountain Pipeline ULC, as General Partner of Trans Mountain Pipeline L.P. (Trans Mountain), pursuant to Part IV of the NEB Act for approval of the toll methodology to be applied on the expanded Trans Mountain pipeline, in the event the pipeline is expanded, updated 3 July 2012 and 10 January 2013, filed with the National Energy Board (NEB or Board) under File No. OF-Tolls-Group1-T260-2012-06 01; and

AND IN THE MATTER OF Board Hearing Order RH-001-2012 dated 25 September 2012;

HEARD in the city of Calgary, Alberta, on 12, 13, 14, 15, 19, 20 and 21 February 2013;

BEFORE:

R. R. George	Presiding Member
D. Hamilton	Member
A. Scott	Member

Appearances	**Participants**	**Witnesses**
G. M. Nettleton T.L. Oleniuk J. Barretto	Trans Mountain Pipeline ULC	I. D. Anderson N. Rinne G. Hill K. MacFarlane J. J. Reed D. R. Lessard S. J. Kelly G. R. Schink D. S. Stoness
N. Schultz	Canadian Association of Petroleum Producers	
L. B. Ho	BP Canada Energy Company	
D.G. Davies	Canadian Natural Resources Limited	
L. B. Ho	Canadian Oil Sands Partnership	
D.G. Davies	Cenovus Energy Inc.	

K. Bergner	Chevron Canada Limited/Chevron Canada Resources	
D.G. Davies	Devon Canada Corporation	
D.G. Davies	Husky Energy Marketing Inc.	
D.G. Davies	Imperial Oil Limited	
L. B. Ho	Nexen Marketing	
L. B. Ho	Statoil Canada Ltd.	
B. J. Roth B. Zalmanowitz	Suncor Energy Marketing Inc./ Suncor Energy Products Partnership	J. V. Heyst G. Brownie G. Matwichuk L. Waverman
S. Miller D. Derworiz B. Wood	Total E&P Canada Ltd.	G. Houston M. McIntyre
C. King	Alberta Department of Energy	
K. Dumanovski C. Beauchemin	National Energy Board National Energy Board	

Written Arguments

Canadian Association of Petroleum Producers

BP Canada Energy Trading Company

Canadian Oil Sands Partnership # 1

Nexen Marketing

Statoil Canada Ltd.

Glossary of Terms and Abbreviations

Available Capacity	hydraulic capacity of the pipeline available for the transportation of petroleum in a month
bpd	barrels per day
BP Canada	BP Canada Energy Trading Company
CAPP	Canadian Association of Petroleum Producers
Chevron	Chevron Canada Limited and Chevron Canada Resources
contract period	15 or 20 year terms as agreed to by shippers in the FSA and TSA schedules
cost of service	total cost of providing service, including operating and maintenance expenses, depreciation, amortization, taxes, and return on rate base.
COSP	Canadian Oil Sands Partnership # 1
Current System	Trans Mountain pipeline system currently in operation at a capacity of 300,000 bpd
Dock or Westridge Dock	Trans Mountain's marine crude oil loading facility at its Westridge Marine Terminal in Burnaby, British Columbia
Ecojustice	Ecojustice Canada
Expansion	the project Trans Mountain proposed to undertake to expand the capacity on its Trans Mountain pipeline system, if such an expansion is approved
Expanded System	the Trans Mountain pipeline system after a future proposed expansion to approximately 890,000 bpd takes place, if such an expansion is approved

Fair Return Standard	The Fair Return Standard establishes the requirements that must be met by the return allowed to a utility. The Fair Return Standard requires that a return: • be comparable to the return available from the application of the invested capital to other enterprises of like risk (comparable investment requirement); • enables the financial integrity of the regulated enterprise to be maintained (financial integrity requirement); and • permits incremental capital to be attracted to the enterprise on reasonable terms and conditions (capital attraction requirement).
Firm Service	contracted capacity on the Trans Mountain Pipeline system
Firm Service Shipper	a shipper who is party to a contract for Firm Service on the Expanded System
Fixed Toll Component	the component of the toll which covers all costs with the exception of power and uncontrollable costs, and is based on the as-built costs and pro-rated between designated delivery point locations on a cubic metre-kilometre basis, with the exception of Westridge Dock tolls which will also include 100 percent (100%) of the costs and expenses for the Westridge Marine Terminal
FSA	Facilities Support Agreement
HHI	Herfindahl-Hirschman Index, a measure of market concentration
Keystone XL	TransCanada Pipeline Inc.'s Keystone XL Pipeline Project
Land Destinations	all Trans Mountain pipeline destinations other than the Westridge Dock
Land Shippers	shippers who ship to Land Destinations
NEB or Board	National Energy Board
NEB Act	*National Energy Board Act*

Nexen	Nexen Marketing
Northern Gateway	proposed Enbridge Pipelines Inc.'s Northern Gateway Pipeline Project
OPUAR	*Oil Pipeline Uniform Accounting Regulations*
Open Season	the process Trans Mountain underwent with potential shippers to offer capacity on the Trans Mountain pipeline system
Part III Application	any future application under Part III of the NEB Act that may be made by Trans Mountain for approval of the physical construction and operation of the facilities for the Expansion
Part IV Application	application from Trans Mountain dated 29 June 2012, as amended 3 July and 10 January 2013, for approval of the toll methodology to be applied on the expanded Trans Mountain Pipeline system, if such an expansion is approved in the future
Rules and Regulations	the rules and regulations governing the transportation of petroleum on the Expanded System
SEPP	Suncor Energy Products Partnership
Statoil	Statoil Canada Ltd.
Suncor	Suncor Energy Marketing Inc. and Suncor Energy Products Partnership
Tariff	Rules and Regulations and toll schedule for the Expanded System
Total	Total E&P Canada Ltd.
Trans Mountain	Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P.
TSA	Transportation Service Agreement
Uncommitted Capacity	remaining Available Capacity taking into account the firm capacity utilized in a given month

Uncommitted Shipper	(i) a shipper that is not a Firm Service Shipper; and (ii) a Firm Service Shipper in respect of any volumes of petroleum nominated by Firm Service Shipper in excess of the sum of its monthly volume and make-up volume
Variable Toll Component	variable portion of the Firm Service toll and uncommitted toll as set out in Schedule C of the FSA and TSA Schedules

Chapter 1

Disposition

The National Energy Board (NEB or Board) has considered the evidence and submissions made by all participants in the RH-001-2012 proceeding.

In this proceeding, the Board was asked by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (Trans Mountain) to consider the toll methodology, and the terms and conditions that would apply to the expanded Trans Mountain pipeline (Expanded System), if such an expansion is built in the future. The applied-for toll methodology resulted from an open season consisting of three rounds (Open Season) and is based on negotiated tolls rather than cost of service. While the toll methodology involved negotiations between Trans Mountain and its shippers, those negotiations included confidential discussions between Trans Mountain and each shipper separately, and consequently it was not presented as a negotiated settlement as set out in the Board's guidelines[1].

The Board finds that the Open Season and negotiation process conducted by Trans Mountain was fair and transparent. The Board's view is that the appropriateness of the Open Season, the presence of alternate sources of transportation, and the Board's mandatory review of the toll methodology mitigated concerns related to Trans Mountain abusing market power from a potential dominant position to negotiate tolls. The Board notes that 13 large, sophisticated shippers executed long-term agreements and 11 of these took no issue with the toll methodology.

The Board is of the view that the proposed allocation of capacity between Firm Service and Uncommitted Service, and the proposed allocation of Uncommitted Capacity between Dock and Land Destinations, is appropriate. As a result, the Board finds that Trans Mountain would satisfy its common carrier obligations.

After considering the entirety of the record, the Board finds, on balance, that the toll methodology as proposed by Trans Mountain will produce tolls that will be just, reasonable and not unjustly discriminatory, pursuant to Part IV of the *National Energy Board Act* (NEB Act). The Board approves the toll methodology as applied for, including the revised Facilities Support Agreement, the Transportation Service Agreement and the Rules and Regulations.

The Board notes Trans Mountain's commitment to continue to maintain the integrity of the pipeline and its safe operation if the proposed toll methodology was approved. Trans Mountain is expected to provide sufficient planning and resources to deliver on

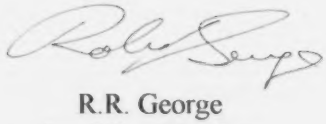
[1] National Energy Board - Tolls & Tariffs - Negotiated Settlements – Letter dated 12 June 2002 (A02885).

its pipeline safety commitments now and during the operation of the Expanded System.

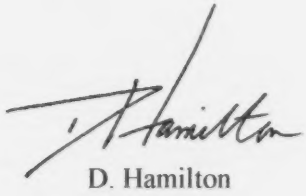
The Board grants the requested relief from the filing requirements of the *Toll Information Regulations* and Guide BB of the NEB Filing Manual; however, Trans Mountain is required to file the information listed in the attached Toll Order. Trans Mountain is not granted relief from subsection 5(1) of the *Oil Pipeline Uniform Accounting Regulations* (OPUAR) and is required to keep its books in accordance with the provisions of the OPUAR as they apply to Group 1 companies. The Board does however grant Trans Mountain specific OPUAR exemptions regarding depreciation as detailed in the Toll Order.

The attached Toll Order and specified relief is contingent on the Expanded System being approved under Part III of the NEB Act and will come into effect if and when this Expanded System is placed into service.

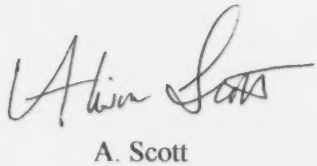
The Board's views and conclusions on individual matters in the following chapters, together with Order TO-004-2013, constitute the Board's reasons for decision with respect to Trans Mountain's Part IV Application heard by the Board in RH-001-2012.



R.R. George
Presiding Member



D. Hamilton
Member



A. Scott
Member

Calgary, Alberta
May 2013

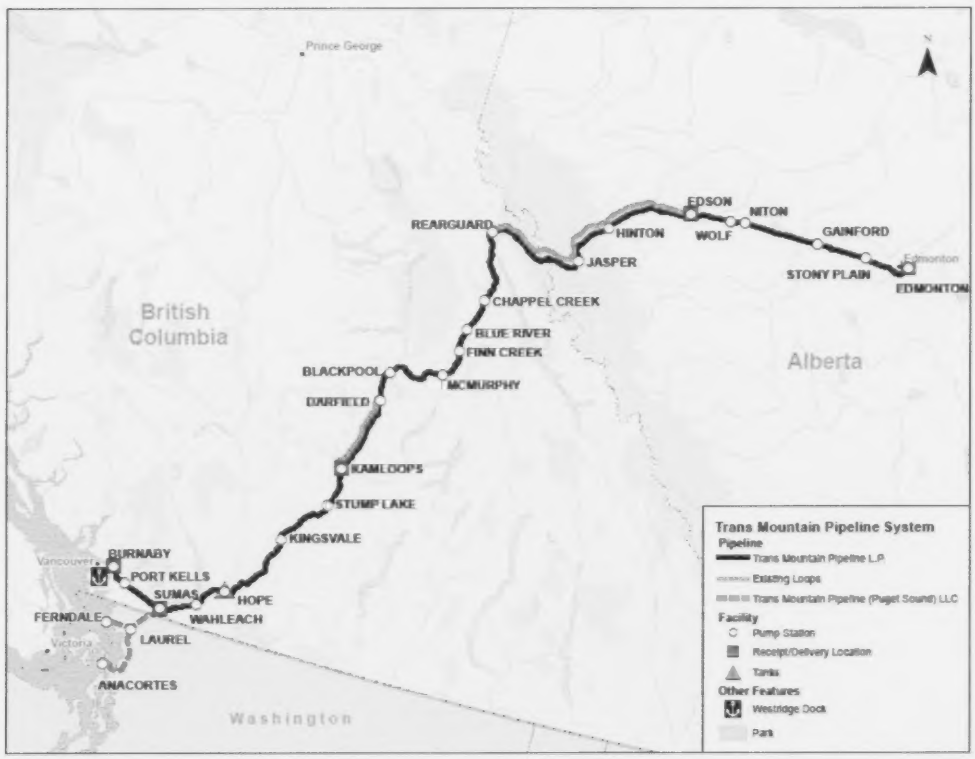
Chapter 2

Introduction

2.1 Background

Trans Mountain owns and operates the Trans Mountain pipeline system (Current System), which transports a range of petroleum products from Edmonton, Alberta, to multiple delivery locations in British Columbia, including deliveries to Washington State on the Puget Sound pipeline and deliveries to the Westridge Marine Terminal for offshore exports. The Current System's capacity is 300,000 barrels per day (bpd).

Figure 2-1 – Map of the Current Trans Mountain Pipeline System



Application

On 29 June 2012, Trans Mountain applied to the Board under Part IV of the NEB Act for an order approving the proposed toll methodology to be used on the Trans Mountain pipeline system in the event a future planned expansion of the system is approved by the Board (Part IV Application).

In its Part IV Application, Trans Mountain requested an Order or Orders of the Board:

- approving the implementation of firm transportation service up to 80 percent (80%) of the Expanded System's nominal capacity, to be provided pursuant to the terms and conditions, including the tolls, set out in the Facilities Support Agreement (FSA) and Transportation Service Agreement (TSA) entered into with shippers through an Open Season process;
- approving the reservation of a minimum of 20 percent (20%) of the Expanded System's nominal capacity for uncommitted volumes, and implementation of uncommitted transportation service to be provided pursuant to the toll methodology; and
- relieving Trans Mountain from the filing requirements of the *Toll Information Regulations* and Guide BB of the NEB Filing Manual, and from keeping its books in accordance with the provisions of the OPUAR as they apply to Group 1 companies, and permitting Trans Mountain to, instead, comply with the requirements of section 5(2) of the OPUAR.

Suncor Energy Products Partnership (SEPP) Application
Prior to receiving the Part IV Application, on 11 May 2012, the Board received an application from SEPP requesting the Board to strike out Section 2.2 of the FSA. Section 2.2 of the FSA required shippers to provide support and cooperation, and not oppose Trans Mountain's efforts to obtain regulatory approvals.

After a comment process, the Board decided on 17 August 2012, to disallow Section 2.2 from the FSA. The Board directed Trans Mountain to update its Part IV Application (which had by this time already been filed) by filing a revised pro forma FSA without Section 2.2.

Trans Mountain updated its Part IV Application on 3 July 2012, and revised it again on 10 January 2013 to reflect the results of Round 3 of the Open Season. A table detailing the Current System and Expanded System's capacity may be found in Chapter 6 of this Decision.

Process on the Part IV Application
The Board began to receive unsolicited submissions from the public after the Part IV Application was filed, questioning whether the Board should hear the Part IV Application before any Part III Application, requesting a public hearing, and asking the Board to consider specific issues during any hearing process.

On 20 August 2012, the Board initiated a comment process on these questions. The Board received numerous submissions from groups and individuals during the comment process. On 25 September 2012, the Board decided to undertake a public hearing process, and it issued Hearing Order RH-001-2012.

In its cover letter to the Hearing Order, the Board addressed the comments it had received on the process for the Part IV Application. It determined that it would hear the Part IV Application now, without delay (prior to any Part III Application).

In this same letter, the Board also addressed the comments it had received on the Draft List of Issues. The Board identified issues that were not related to the Part IV Application and issued the List of Issues as part of the Hearing Order. This List of Issues is attached to this Decision as Appendix II.

Participation

On 25 October 2012, the Board issued its List of Parties. The Board decided that all commercial parties, including current or potential crude oil shippers on the Trans Mountain pipeline system, oil producers and oil refiners, be granted Intervenor status as these parties stand to be impacted by the Board's decision and had shown sufficient interest in the issues to be tried in RH-001-2012. The Board also granted Intervenor status to the relevant provincial government agencies with an interest in the production, transportation and marketing of petroleum products to be carried on the Trans Mountain pipeline system and who stand to be impacted by the Board's decision. For other persons who requested and were not granted intervenor status, the Board allowed participation through the filing of written letters of comment.

Safety and Environmental Protection

The Board received letters of comment from a variety of individuals and organizations regarding the Part IV Application, but these appeared to raise matters that may be more appropriately addressed during any proceeding for a future Part III Application, if such an application is filed by Trans Mountain. As mentioned above, issues raised pertained to the physical integrity of the pipeline, safety, and environmental protection in the case of accidents or malfunctions, are beyond what could be addressed in a toll methodology proceeding.

The Board is committed to safety and environmental protection. Pipeline companies are required by the Board to anticipate, prevent, manage and mitigate potentially dangerous conditions associated with their pipelines. The Board expects regulated companies to invest the resources required for safe operations, environmental protection, and full regulatory compliance at all times. The Board notes Trans Mountain's commitment to continue to maintain the integrity of the pipeline and its safe operation if the proposed toll methodology was approved.

Chapter 3

Open Season

Trans Mountain submitted that in early 2011, it began discussions with its shippers and other interested parties about increasing the capacity of the pipeline and improving access to the west coast and offshore markets. It became clear there was strong commercial interest and Trans Mountain held an Open Season to obtain an indication of shippers' willingness to support an Expansion. This Chapter will consider the appropriateness of the Open Season conducted by Trans Mountain for the Expanded System.

3.1 Position of Trans Mountain

During the Open Season, Trans Mountain stated that it had regard to a number of objectives, including:

- the need to ensure that all existing and prospective shippers had equal access to information and a fair opportunity to take part in the process;
- the need to design an Expansion that would provide adequate capacity to meet all shippers' requests for Firm Service;
- the need to ensure that Uncommitted Capacity would be available;
- the need to design terms and conditions in the Open Season documents and adjust those terms and conditions through negotiations that would meet Trans Mountain and the shippers' commercial requirements;
- the need to ensure commercial confidentiality during the process to protect both the shippers' and Trans Mountain's competitive interests; and
- the need to bring closure to the process so that the project could proceed on a timely basis.

To achieve these objectives, Trans Mountain submitted that it conducted a fair, open and transparent Open Season process. Trans Mountain stated that through three separate rounds, the process afforded all potential shippers with an equal opportunity to participate. Trans Mountain submitted that all potential shippers were made aware of, and given the opportunity to negotiate with Trans Mountain on matters concerning the criteria and parameters associated with the Expansion and the related contractual arrangements.

Trans Mountain submitted that in initial discussions related to the Open Season for a potential Expansion, it consulted directly with all existing shippers. In addition, consultations were held through the Canadian Association of Petroleum Producers (CAPP).

Round 1 of the Open Season commenced on 20 October 2011. All existing and prospective shippers known to Trans Mountain were notified by email and the Open

Season was advertised in various publications. On 6 January 2012, all parties were advised that the Open Season was being extended approximately one month to 16 February 2012.

Trans Mountain again notified all parties on 27 March 2012 that, regardless of whether they had or had not submitted an FSA, the Open Season was being re-opened for Round 2 which would last approximately two weeks to 10 April 2012.

After Rounds 1 and 2 of the Open Season, Trans Mountain received qualifying commitments for Firm Service on the Expanded System from nine shippers totaling 508,000 bpd, of which 408,000 bpd was directed to the Westridge Dock and 100,000 bpd to Land Destinations. The qualifying shippers at the end of Rounds 1 and 2 were: BP Canada Energy Trading Company (BP Canada), Canadian Oil Sands Partnership #1 (COSP), Cenovus Energy Inc. (Cenovus), Devon Canada Corporation (Devon), Husky Energy Marketing Inc. (Husky), Imperial Oil Limited (Imperial), Nexen Marketing (Nexen), Statoil Canada Limited (Statoil) and Tesoro Canada Supply & Distribution Ltd. (Tesoro). Trans Mountain offered both a 15-year term and a 20-year term; all of these qualifying shippers executed a TSA with a term of 20 years.

On 17 August 2012, the Board issued a decision that struck Section 2.2 of the FSA in response to a complaint from SEPP. This resulted in a supplemental round to the Open Season (Round 3). Trans Mountain stated that the purpose of Round 3 was to allow those parties who would have executed a FSA, but for the existence of Section 2.2, to do so.

On 19 October 2012, Trans Mountain issued its Notice of Round 3 Open Season. Round 3 closed on 28 November 2012, with requests received from Canadian Natural Resources Ltd (CNRL), Suncor Energy Marketing Inc. and SEPP (collectively Suncor), and Total E&P Canada Ltd (Total). The total firm commitments from all three rounds were 707,500 bpd. This exceeded the 604,000 bpd of firm transportation service that would be available based on up to 80 percent (80%) of the Expanded System's nominal capacity of 755,000 bpd applied for in the Part IV Application, initially filed on 29 June 2012.

Trans Mountain described in Round 3 of the Open Season what options it would consider in the event of oversubscription. Trans Mountain submitted that it had conversations with its shippers about what it should be doing given the contemplated Expansion was now oversubscribed: increase the capacity of the Expansion; keep it the same; or reduce nominated volumes. Based on these conversations, Trans Mountain revised its Part IV Application to accommodate 890,000 bpd of nominal capacity so that volumes committed by the shippers in the Open Season would not be apportioned and no volumes would be turned back.

Trans Mountain noted that all parties, including shippers who participated in Round 3, were advised of the larger project scope with greater nominal capacity, that volumes would not have to be apportioned, and that it was offering a 10 cent toll

reduction. Trans Mountain stated that the shippers participating in Round 3 had an opportunity at that point to withdraw or terminate the agreement by not returning the signed FSA in the 30-day period after this notice was given.

Trans Mountain submitted that one-on-one conversations with shippers yielded a better understanding of shippers' concerns and interests than would have occurred in a group setting. Trans Mountain's view was that shippers would not have been talking as openly in a group setting about their desired capacity, products they wished to ship, and the destinations. Trans Mountain stated that the execution of confidentiality agreements is not uncommon in such negotiations. Trans Mountain also stated that confidentiality agreements do not taint the fairness of the negotiation process and that there are no Board guidelines or legislation prohibiting bilateral negotiations. In Trans Mountain's view, confidential conversations formed a key part in defining all of the terms that went into the negotiation. Mr. Reed, an expert witness for Trans Mountain, noted that based on his review, the practice of requiring the execution of a confidentiality agreement and the restrictions it provided in terms of talking amongst Open Season participants is not uncommon in the industry.

Trans Mountain noted that the Open Season process resulted in gives and takes and the end product was a package result. Trans Mountain submitted that the Firm Service Shippers have reached an agreement that is negotiated on a "willing buyer, willing seller" basis. It noted that no one element of that package should be considered in isolation from all the other interrelated elements. Trans Mountain further stated that the benefit of the gives and takes applied equally to all shippers.

Trans Mountain submitted that every party to the Open Season received the same contract, the same FSA, and the same term sheet. It further stated that every party had the opportunity to engage with Trans Mountain and have its concerns and issues addressed to the extent possible. Trans Mountain noted that in response to ongoing feedback and negotiations with shippers during the Open Season, it made more than 12 amendments to the terms and conditions of the FSA, the TSA and the Rules and Regulations throughout the Open Season. Trans Mountain stated that these 12 concessions were indicative of a clear level of workable negotiations between shippers and Trans Mountain.

Trans Mountain stated that it was important to note that out of 13 shippers, all of who are large sophisticated parties, that chose to execute long-term agreements, only Total challenged the Open Season process. Trans Mountain noted that despite challenging the Open Season process, Total still decided to execute a long-term contract.

Trans Mountain's expert witness, Mr. Reed, stated that the Board should apply a two-part test to consider non-supportive parties during negotiations. According to Mr. Reed, the Board would need to determine whether parties were treated differently and whether they were situated differently. Mr. Reed's view was that no shipper had been treated differently. Trans Mountain was ultimately of the view that the information provided to shippers and the process used for the negotiations was fair.

3.2 Position of Intervenors

Total

Total submitted that it supports the concept of transportation of oil to the west coast and it supports the Expansion.

Total, however, asserted that the Open Season was neither fair nor transparent. Total indicated that pipeline companies have historically consulted collectively with potentially interested shippers to develop terms and conditions that are acceptable to all parties. Total argued that Trans Mountain's approach involved exclusive and confidential discussions that divided and isolated the shippers and limited access to information or collaboration on common issues. According to Total, shippers in this case were precluded from collaborating as a result of mandatory confidentiality agreements that were executed separately between Trans Mountain and each shipper. In contrast to previous successful settlement processes, Total was of the view that this negotiation cannot be characterized as "open" for several reasons:

- The negotiation did not provide for an understanding of the elements that establish the costs of the pipeline.
- Trans Mountain originally required shippers to support the Part IV Application before the Board as a pre-condition to negotiation creating concern over the process and uncertainty.
- The restrictions imposed by the confidentiality agreement isolated shippers and prevented them from discussing toll and tariff matters with other shippers.
- The one-on-one negotiation undertaken by Trans Mountain meant that the flow of information was constrained and controlled by Trans Mountain. Total stated that there was no opportunity to know what proposed changes had been raised or to understand why some changes were accepted while others were rejected.

In Total's view, the process did not allow for sufficient information to determine if the proposed tolls were just and reasonable.

Total stated that it was provided notice of Round 1 and Round 2 of the Open Season at the same time as other prospective shippers. Total also stated it had commercial discussions and executed a confidentiality agreement with Trans Mountain as part of the Open Season negotiation process. In addition, Total submitted that it discussed its concerns with Trans Mountain and what it would have liked to have seen in the TSA and FSA. Total noted that Trans Mountain accepted some but not all of its suggestions, and the changes Trans Mountain accepted were included in the documents that Total received for the purposes of Round 3 of the Open Season.

Total submitted that it regretted that it did not continue to negotiate vigorously following the conclusion of Round 1 and 2 of the Open Season. Total stated that its understanding when it chose its volumes for Round 3 was that there was a limited amount of capacity remaining available. In its view, the scope of the Expansion was

fixed as defined by the cost estimate in the contract which Total understood to represent a 30-inch pipeline.

Total submitted that following Round 3 of the Open Season, it took the form of the agreement forward to its executive committee. Total stated that it had discussions with the executive committee about its ability to raise its concerns about the project in front of the Board and have them heard. Total stated that the relief it was seeking was the opportunity to improve the commercial basis for the project.

Total requested that the Board require Trans Mountain to enter into a negotiated settlement process with interested shippers with the goal of presenting in a timely manner a comprehensive settlement proposal to the Board. Total specifically asked the Board to allow for an extension of the negotiation process so that Trans Mountain and the shippers have the opportunity to continue discussions and negotiations before the end of 2013. According to Total, this should be done to perfect the information and transparency deficiencies in the current process and to disclose a clear basis for the tolls. Total indicated that it is not requesting for a completely new negotiation process, but rather, it is requesting the use of the *Board's Guidelines for Negotiated Settlements of Tolls, Traffic and Tariffs* to remedy the current process deficiencies, the lack of a clear basis for the tolls and to build on the work that has been undertaken so far.

Suncor

Suncor took no issue with the Open Season process. In Suncor's view, the primary purpose of an open season is to allocate capacity in a non-discriminating manner. Suncor was of the view that this purpose was achieved following the completion of the Round 3 of the Open Season. At that point, Suncor's view was that all parties were provided with fair access to capacity unencumbered by section 2.2 of the FSA.

Statoil, BP Canada, Nexen and COSP

Firm Service Shippers such as Statoil, BP Canada, Nexen, and COSP had no issues with the Open Season.

These shippers argued that the Board should have regard for the following facts in evaluating the appropriateness of the Open Season:

- There was wide circulation of Trans Mountain's Notice of Open Season which commenced on 20 October 2011;
- A form of the FSA and TSA, along with other information, was distributed by Trans Mountain to interested parties;
- COSP, Nexen and Statoil confirmed that they received information when requested;
- COSP, Nexen and Statoil confirmed that they received sufficient information to evaluate the proposed FSA and TSA;
- BP Canada and Nexen, among others, confirmed that negotiations and discussions ensued between Trans Mountain and individual shippers;

- COSP and Statoil confirmed that the negotiations resulted in "gives and takes" as reflected in part in the Key Changes to Commercial Offering filed by Trans Mountain; and,
- The negotiations and discussions resulted in a package of terms and conditions ultimately contained in the FSA and TSA executed by the Firm Service Shippers.

According to these shippers, the above facts demonstrate that the Open Season conducted by Trans Mountain was consistent with other open seasons conducted by Trans Mountain which have been reviewed and approved by the Board.

Chevron Canada Limited and Chevron Canada Resources (Chevron)
Chevron submitted that it supports the Expansion. Chevron was of the view that Trans Mountain should be directed to implement committed tolls for terms less than 15 years if contract capacity is to become available on the Expanded System in the future. Chevron stated that it was not comforted with the negotiation process but reluctantly agreed to let the results of the Open Season stay as they were. Chevron did not execute a TSA for service on the Expanded System.

3.2.1 Trans Mountain Reply

In response to Chevron's request for contract terms of five years, Trans Mountain stated that creating another group of five-year contracts would increase the re-contracting risk associated with the Expansion. To deal with that risk, Trans Mountain would have had to either reduce the uncommitted volumes or significantly increase Firm Service rates which could have caused the Expansion to fail. Trans Mountain stated that this was an issue for another day and would evaluate in the future, if valid commercial reasons emerged, the appropriateness of offering shorter terms.

Trans Mountain stated that Total's intent behind the relief it seeks was not about improving the commercial basis for the project. Total's intent, Trans Mountain argued, was to improve its individual commercial outcome in the deal it struck, which its executive committee approved and executed.

Trans Mountain stated that Total's concerns regarding the fairness of the Open Season process were unfounded. Trans Mountain further noted that it provided a transparent, fair and balanced Open Season process that followed the principles that are well established in North America for acquisition of capacity on a pipeline. Trans Mountain stated that its Open Season process was comparable to other open seasons for oil pipelines that have been approved by the Board.

Views of the Board

The Board notes that Trans Mountain chose to file an application to have its proposed toll methodology approved by the Board. This Part IV Application was not a negotiated toll settlement nor was it a contested toll settlement. Therefore, there was no need to follow the *Board's Guidelines for Negotiated Settlements of Tolls, Traffic and Tariffs* for this Part IV Application. The Board has made clear in the past that for tolls and tariff matters, regulated companies can choose to either 1) file an application for adjudication or 2) file a negotiated settlement. The Board has no preference as to which approach is used. It is up to the applicant to determine how to apply to the Board and it is not the Board's practice to require a negotiated settlement from parties.

The Board does not prescribe guidelines governing the process for open seasons; however, it does expect that applicants conducting open seasons will consult with all interested parties in a transparent and fair manner.

In this case, the Board is satisfied that all parties who were interested in contracting volumes on the Expanded System had an opportunity to do so during three binding rounds of Open Season. In the Board's view, participants in the Open Season were sophisticated commercial parties and they were provided with sufficient information in a timely manner. The Board notes that of the 13 shippers who have executed long-term contracts, only Total took issue with the Open Season.

While some shippers might have wanted further information before nominating volumes as part of the Open Season, no evidence was presented that Trans Mountain withheld material information during the Open Season process. The Board agrees with Trans Mountain that there is no requirement that an open season process be optimal to any individual party for it to be found fair and transparent. To the extent possible, the Board encourages transparency of information and collaboration among parties.

The Board notes that parties are not precluded from conducting bi-lateral negotiations and there may be circumstances when this type of negotiation is appropriate. In this case, the Board is of the view that the respective competitive position of prospective shippers may have influenced negotiations if such

negotiations would have occurred in a group setting. As a result, the Board finds Trans Mountain's use of bilateral negotiations to be legitimate in this case. The Board is not concerned about the use of confidentiality agreements in these circumstances. Without these confidentiality agreements, the effectiveness of bilateral negotiations could be undermined and hinder the process. The Board notes that confidentiality agreements are common in the industry and do not taint the fairness of the negotiation process if the Open Season process is fair and transparent.

The Board is satisfied that the process undertaken by Trans Mountain was fair, without collective negotiations between Trans Mountain and prospective shippers having occurred. Changes to the Open Season documents that were accepted by Trans Mountain as a result of bi-lateral negotiations were communicated and offered to all parties who signed a confidentiality agreement. Parties were then in a position to assess the potential impacts that any change could have on their interest to commit volumes on the Expanded System. As a result, the Board is of the view that all parties involved in the Open Season were treated in a fair and equal manner.

The Board was not persuaded by Total's argument that discussions and negotiations should continue given the existing level of support and ample opportunities to explore issues provided by Trans Mountain during the Open Season process. The Board has found the Open Season process to be appropriate. There is no evidence that extending the negotiation process would be beneficial to the parties or that it would improve the commercial basis for the Expansion.

Regarding any intention on Total's part that it wished to improve its commercial terms, the Board reminds parties that the Board's mandate is not to protect any individual commercial position. The Board's mandate with respect to tolls and tariffs, as established under the NEB Act, is to determine the justness and reasonableness of tolls.

As mentioned earlier, Trans Mountain chose to apply to the Board to have its toll methodology adjudicated. Once the Board is seized with an application made in good faith and when parties have made their submissions, the Board has a legal duty to discharge its mandate and adjudicate on the matter in a timely manner.

In the Board's view, the fact that concessions were made by Trans Mountain and commitments were made for significant volumes of firm capacity, on equal terms, by a wide variety of shippers, support the finding that the Open Season was fair and transparent.

The Board was not persuaded by Chevron's argument that Trans Mountain should be required to offer a shorter-term toll if contract capacity becomes available in the future. In the Board's view, it is the responsibility of Trans Mountain, in consultation with interested parties, to develop terms and conditions for any potential future service offering. The Board expects that Trans Mountain would evaluate changes in commercial circumstances to assess the appropriateness of offering shorter terms in the future. Such service offerings will be subject to Board review before implementation. Based on the record of this proceeding, the Board is not prepared to require that any specific attribute be attached to potential future contract capacity.

Based on the above, the Board finds that the Open Season conducted by Trans Mountain was appropriate.

Chapter 4

Market Competitiveness

Some parties to this proceeding took the position that Trans Mountain had market power in negotiating the tolls to be applied to the Expanded System. In this Chapter, the Board will evaluate if Trans Mountain had market power and, if so, whether it abused a potential dominant position in the toll negotiations.

4.1 Position of Trans Mountain

Trans Mountain submitted that it did not have market power in negotiations with shippers and supported this claim with an assessment of Trans Mountain's market share from its expert witness, Dr. Schink. Dr. Schink used the adjusted capacity methodology to calculate the Herfindahl–Hirschman Index (HHI) in the origin and destination markets in which Trans Mountain operates. Trans Mountain submitted that the methodology used by Dr. Schink was a widely accepted measure of market concentration and provided more market information than the four-firm concentration ratio used by the Canadian Competition Bureau. Dr. Schink's analysis included alternatives to the Trans Mountain pipeline, such as rail or alternative pipelines. These alternatives were included on the basis of the actions of participants in the market, rather than on a netback analysis. The results of Dr. Schink's HHI analysis indicated that these markets were workably competitive and Trans Mountain could not have exercised market power over shippers in these markets.

Trans Mountain stated that, in the Open Season, it faced substantial competition from several competing alternatives: Keystone XL, potential Northern Gateway, the potential Enbridge Pipelines Inc. Line 9B reversal, the potential TransCanada gas pipeline conversion, and rail. Further, Trans Mountain noted that it conducted other open seasons in 2006 and 2008, which failed due to competition from other pipelines and it had no assurance that this Open Season would be successful. Mr. Reed stated that the existence of sufficient and available alternative sources of transportation of similar quality acted as a check on Trans Mountain's market power. If no reasonable alternative existed, Mr. Reed's view was that the Board should expect to see the majority of shippers opposing the toll methodology at the hearing, which was not the case. In addition, Trans Mountain noted that several shippers elected not to enter into long term contracts with Trans Mountain because they felt they had better alternatives, which is indicative of the level of competition in the market.

According to Trans Mountain, the significant concessions made by Trans Mountain to shippers reflect a competitive negotiation process. This demonstrates the give-and-take of negotiations as opposed to a pipeline company exerting market power over captive shippers. Mr. Reed asserted that it is unnecessary for the markets in which Trans Mountain operates to be found workably competitive (by Dr. Schink's

HHI analysis) for the applied-for toll methodology to produce just and reasonable tolls. Instead, Mr. Reed suggested that the appropriate standard of review would be to determine whether the Open Season process, and the negotiating positions of the potential shipper were sufficiently robust for a negotiated result to produce just and reasonable results. According to Mr. Reed, as long as some shippers have reasonable alternatives and a reasonable degree of negotiating leverage, the outcome should be deemed just and reasonable, regardless of the determination on competitiveness.

4.2 Position of Intervenors

Suncor

Suncor submitted that Trans Mountain's Open Season happened against the backdrop of increased regulatory uncertainty surrounding the Keystone XL and Northern Gateway pipelines. In addition, Suncor stated that Trans Mountain is currently the only pipeline able to access crude oil markets in Asia from the Western Canadian Sedimentary Basin, where crude oil prices are significantly higher than in the interior of North America, evidenced by price differentials as high as $38 per barrel, which has led to high levels of apportionment on the Current System. According to Suncor, these factors allowed Trans Mountain to exert significant market power during Open Season negotiations. Suncor stated it did not view any alternatives as economically feasible to the Expansion because there are substantial differences between the netbacks a shipper can receive shipping on the Current System when compared to alternatives.

Suncor's expert witness on competition, Dr. Waverman, stated that the adjusted capacity HHI methodology resulted in inappropriate conclusions about the competitiveness of the market. Instead, he proposed the effective capacity HHI methodology as an alternative that better reflects the dynamics of the actual market. Dr. Waverman concluded that Trans Mountain wields considerable market power and the market in which Trans Mountain operates is not workably competitive. In addition, Suncor argued that the appropriate measure of market share is the four firm concentration ratio, as this is the standard used by the Canadian Competition Bureau.

After the removal of section 2.2 from the FSA, Trans Mountain received Firm Service commitments for an additional 200,000 bpd and expanded the size of their project. According to Dr. Waverman, the results of removing section 2.2 demonstrate that Trans Mountain was actively exercising market power, by limiting the Firm Service capacity on the pipeline to only shippers who agreed to section 2.2 of the FSA. Dr. Waverman stated that Trans Mountain's actions were consistent with the exercise of market power by a monopolist. Dr. Waverman was also of the view that Trans Mountain could have better addressed shippers' needs by lowering the toll for all shippers.

Suncor acknowledged that it is possible that the main constraint on pipeline companies' bargaining power is not the fact that the shippers are large, sophisticated corporations, but that the shippers have the potential protection offered by the Board

and its processes. Dr. Waverman submitted that the existence of contracts does not indicate competitiveness, even among sophisticated commercial parties. Suncor noted that if Trans Mountain appeared to be opportunistic in its applied-for toll methodology, then this would conflict with Trans Mountain's desire to maintain working relationships with both shippers and the Board. Dr. Waverman explained that gaining a reputation for opportunism may lead regulators to take a dimmer view of subsequent applications and proceedings which may impact long-term market relationships. Dr. Waverman noted that because Trans Mountain could decide not to proceed with the Expansion if the Board approves the applied-for toll methodology, Trans Mountain still had market power over shippers. This take or leave it approach, Suncor argued, was indicative of market power.

CAPP

CAPP submitted evidence by Mr. Pinney supporting the use of the effective capacity methodology to calculate the HHI. CAPP stated that the effective capacity methodology better reflects the reality of the western Canadian origin market for crude oil, where the pipelines that transport crude oil out of the region are essentially full, while Dr. Schink's methodology was appropriate for a market with significant surplus capacity. Mr. Pinney's calculations indicate that the western Canadian origin market for crude oil is not workably competitive.

CAPP did not take position on the usefulness of HHI analysis in these proceedings. CAPP requested that the Board use the data from the effective capacity methodology rather than the adjusted capacity methodology if the Board deems market share analysis to be useful.

Views of the Board

The Board did not find that the issue of whether Trans Mountain's markets are workably competitive to be a determinative factor when assessing the appropriateness of the applied-for toll methodology. When considering contracts between commercially sophisticated parties resulting from an appropriate open season process, the Board is of the view that the relevance of this factor diminishes. The Board is also of the view that the relevant issue is not whether Trans Mountain operated in workably competitive markets, but whether Trans Mountain used market power to abuse a potential dominant position and negotiate tolls that were neither just nor reasonable.

The Board agrees with Suncor that the current crude oil price differential between the destination markets served by Trans Mountain and alternative transportation options may have given Trans Mountain some market power. The attractiveness of offshore markets is evidenced by current price differentials as high as $38 per barrel. In the Board's view, these current market conditions put Trans Mountain in a strategic negotiating position. However, the Board is of the view that any concern related to potential abuse of market power was

mitigated by three factors: (1) the appropriateness of the Open Season process; (2) the mandatory review by the Board of the toll methodology; and (3) the presence of alternate sources of oil transportation.

In Chapter 2 of this Decision, the Board found the Open Season to be appropriate.

In the Board's view, the requirement for a regulatory review of tolls and tariffs acts as a significant constraint on a pipeline company's market power. The Board agrees with Suncor that Trans Mountain may have exerted market power in Rounds 1 and 2 of the Open Season to restrict capacity to shippers willing to contractually forfeit their right to bring forward concerns about the toll methodology to the Board. As a result of shipper complaints, the Board ordered the removal of section 2.2 in the FSA on 17 August 2012. Trans Mountain then held Round 3 of the Open Season, which made it possible for parties to contract capacity on the Trans Mountain pipeline and still maintain their ability to raise concerns with the Board. As a result of Round 3 of the Open Season, Firm Service on the Trans Mountain pipeline increased by 200,000 bpd and tolls were lowered for all shippers. This outcome demonstrates how the Board's review and subsequent decision curtailed Trans Mountain's potential market power.

The Board also considered the presence of alternate sources of transportation for crude oil and refined product as a way to limit Trans Mountain's market power. The fact that shippers are using rail and alternative pipelines suggests that, based on actual market behaviour, these are alternatives to the Trans Mountain pipeline. In addition, the Board is of the view that the Keystone XL and proposed Northern Gateway pipelines, while not currently in service, are sufficiently developed as potential alternatives to the Trans Mountain pipeline to act as limiting factors on the market power of Trans Mountain. The Board also notes that some shippers chose not to execute agreements with Trans Mountain, which indicates that other alternatives, at least for those shippers, were better than Trans Mountain's Expanded System.

Evidence submitted using market share data to calculate the HHI and four-firm concentration ratio was of limited use to the Board in evaluating the appropriateness of the toll methodology. Crude oil pipelines like Trans Mountain tend to be natural monopolies and, as a result, highly concentrated markets are to be expected.

The Board also found the application of the adjusted capacity methodology in calculating the HHIto be inappropriate in this case. The methodology was conceived for a situation with significant surplus pipeline capacity and, in the Board's view, this is not the current market reality faced in the markets in which Trans Mountain operates. The Board agrees with CAPP and Suncor that the correct methodology for calculating the HHI in this case would be the effective capacity methodology. By not arbitrarily decreasing market share, the Board is of the view that the effective capacity methodology better reflects the actual market shares held by participants and therefore, the competitiveness of the market.

The four-firm concentration ratio is a tool used by the Canadian Competition Bureau to determine if a merger will result in the substantial lessening of competition. The Board does not view the Expansion to be the same as a merger and, as explained above, the Board is of the view that pipelines tend to operate in highly concentrated markets. While the four-firm concentration ratio may provide evidence as to the presence of market power, the Board's main concern in this proceeding was the potential abuse of market power by Trans Mountain.

The Board finds that Trans Mountain did not use market power to abuse a potential dominant position to negotiate tolls.

Chapter 5

Negotiated Toll

The Board's mandate when considering a toll methodology is to determine whether the resulting tolls will comply with section 62 of the NEB Act, which states:

> All tolls must be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

and section 67 of the NEB Act, which states:

> A company shall not make any unjust discrimination in tolls, service or facilities against any person or locality.

In discharging this mandate, the Board considers all relevant factors specific to each application. This Chapter will provide the Board's considerations of the proposed toll methodology for the Expanded System.

5.1 Toll Design

5.1.1 Position of Trans Mountain

5.1.1.1 Firm Service Toll

Trans Mountain proposed that the Firm Service toll consist of a Fixed and a Variable component. The Fixed Toll Component would be based on the as-built cost and pro-rated between designated delivery point locations, with the exception of Westridge Dock tolls which would also include 100 percent (100%) of the specific costs and expenses associated with service to Westridge Dock. The Fixed Toll Component would cover all costs with the exception of power and future uncontrollable costs. Trans Mountain indicated that the toll methodology provides for an escalator in which the Fixed Toll Component will be increased by 2.5 percent (2.5%) each year. The Variable Toll Component would recover power costs and the uncontrollable costs. According to Trans Mountain, the toll design contains features designed to promote fairness and efficiency with factors for distance, product, and commitment.

The proposed toll methodology provides for the following:

- 20-year Fixed Toll Component will be determined by applying a 10 percent (10%) discount to the adjusted 15-year Fixed Toll Component; and
- Volume commitment discount of 7.5 percent (7.5%) on the Fixed Toll Component for contracts with volumes greater than or equal to 75,000 bpd.

Trans Mountain stated that it relied on its pipeline operating and expansion experience in estimating the costs to be included in the Fixed Toll Component. It further stated that the negotiated toll methodology used during the term of the contracts is expected to provide sufficient toll revenue to ensure that Trans Mountain can continue to operate for an indefinite period, even if significant unanticipated increases occur for costs covered by the Fixed Toll Component.

Trans Mountain submitted that the proposed Variable Toll Component would include the recovery of uncontrollable costs resulting from changes in operations which are not currently anticipated by Trans Mountain, or cannot reasonably be included in calculating the toll. Trans Mountain listed a number of costs that would fall into this category such as:

- increases in costs resulting from changes in legislation, regulations, orders or directions from any government or regulatory body (including the NEB), which result in changes to safety, integrity, environmental practices or procedures, land use rezoning; and
- the collection of pipeline abandonment costs pursuant to Board Order RH-2-2008 and any subsequent Board Orders.

Trans Mountain indicated that costs related to integrity, insurance, safety, and spill response and clean-up, will be covered by the Fixed Toll Component and that Trans Mountain is at risk for these costs. Trans Mountain remains responsible for these costs in the future, regardless if they are high or low. If unanticipated costs arise out of these categories, these costs will be flowed through to shippers in the Variable Toll Component. Trans Mountain confirmed its commitment to continue to maintain the integrity of the pipeline and its safe operation if the proposed toll methodology was approved. According to Trans Mountain, the proposed toll methodology does not negatively impact any required integrity and safety work that would occur after the commencement of operation the Expanded System and for the duration of the contract periods.

Pursuant to Section 10.1 of the TSA, Trans Mountain is required to justify adjustments to the Variable Toll Component to shippers with supporting evidence. If there is a dispute between Trans Mountain and the shippers which cannot be resolved, the matter may be referred to the Board for resolution. Trans Mountain intends to have the discussion and dispute resolution steps described in its Part IV Application apply to all shippers.

5.1.1.2 Uncommitted Toll

Trans Mountain submitted that the toll for uncommitted service would also be comprised of a fixed and a variable component. The Variable Toll Component would be the same as for Firm Service. The Fixed Toll Component for uncommitted service would be determined by applying a 10 percent (10%) premium to the Firm Service 15-year Fixed Toll Component.

Trans Mountain stated that the proposed tolls for uncommitted service are just and reasonable because they will be reasonably tied to the tolls for Firm Service. According to Trans Mountain, by tying the tolls for the two services together, the Uncommitted Shippers benefit from the negotiating power and competitive conditions that produced the just and reasonable toll methodology for Firm Service. Trans Mountain was of the view that the proposed relationship between tolls for Firm Service and uncommitted service is important in order for the proposed toll methodology to be fair and economically efficient.

Trans Mountain sought to reduce the financial risk in the investment required for the Expanded System while offering sufficient differentials in the tolls between the 15-year and 20-year contracts and the uncommitted tolls. Lower tolls were negotiated for the highest duration commitment and the largest volume commitment, and higher tolls were negotiated for shorter durations. Trans Mountain indicated this structure is consistent with other negotiated toll agreements as, for example, the Keystone XL and Express Pipelines Ltd. pipeline projects.

According to Trans Mountain, the applied-for toll methodology reflects a balance of issues settled between committed shippers and Trans Mountain. Trans Mountain argued that no one element of the achieved agreement can be considered in isolation. Trans Mountain was of the view that the toll differentials reflect the outcome of a negotiated process and are only one part of an overall toll methodology agreed to amongst committed shippers. Trans Mountain stated it would be unfair to the committed shippers to change the differentials at this time.

5.1.1.3 Revenue Sharing Mechanism

A revenue sharing provision was proposed by Trans Mountain in which it would share with all shippers 50 percent (50%) of all Fixed Toll revenue collected from Uncommitted Shippers on volumes shipped in excess of 85 percent (85%) of Available Capacity.

5.1.2 Position of Intervenors

Suncor
Suncor argued that the Variable Toll Component allows for Trans Mountain to flow through almost any costs to shippers. Suncor submitted that the proposed Part IV Application did not sufficiently clarify what costs could be flowed through to shippers. Specifically, Suncor stated that the Variable Cost provision in Schedule C, article 3.3 of the FSA/TSA allows Trans Mountain to pass on any other uncontrollable capital costs to shippers. According to Suncor, an approach where the Variable Toll Component would allow Trans Mountain to increase tolls for anything that it has not anticipated would amount to a cost of service toll methodology.

5.1.2.1 Other Submissions

Ecojustice Canada
In letters of comment, Ecojustice Canada (Ecojustice) argued that the interests of local residents could be affected. Ecojustice asserted that an approved toll methodology and resulting fixed tolls might be used as a justification against attaching conditions to a potential approval of a facilities expansion. Ecojustice submitted that this could result in additional costs on the operator, and the company could be left without resources to deal with a malfunction such as a spill.

City of Vancouver
In a letter of comment, the City of Vancouver questioned whether "uncontrollable" costs were in fact uncontrollable, and whether additional costs should be included in the toll and paid by shippers on a pro-rata basis to cover changes to safety, pipeline integrity and environmental requirements.

5.2 Risk and Reward

5.2.1 Position of Trans Mountain

Trans Mountain submitted that the tolls on the Expanded System were not based on a cost of service methodology and that typical cost of service information was not appropriate for assessing the applied-for tolls. Trans Mountain was of the view that the proposed toll methodology is the result of negotiations with sophisticated committed shippers and the resulting balance of terms and risks was just and reasonable.

Trans Mountain stated that it made an investment decision based on a return on investment that was acceptable, taking into account the cash flow generated by the negotiated tolls that were agreed to by Trans Mountain and Firm Service Shippers. The investment decision criteria included a targeted unlevered internal rate of return in the typical range of 12 percent (12%) to 15 percent (15%). Trans Mountain noted that it was not seeking approval from the Board of its internal rate of return. Trans

Mountain indicated that its approach to assessing potential new pipeline investment is to apply a hurdle rate and when this hurdle is met, Trans Mountain and its investors have the confidence needed to assume all applicable risks inherent in this investment. For example, Trans Mountain indicated that tax risk needs to be considered properly since there is a greater likelihood of tax rates being above the current tax rate than falling below this value in the future.

Trans Mountain submitted that it voluntarily relinquished the right to come back to the Board for 20 years to seek a toll increase for Firm Service and it is taking the risk associated with future fluctuations in the level of uncommitted service revenues. Trans Mountain was of the view that the market has priced the risk premium for this commitment in the terms for Firm Service, and it is reasonable to use this as the basis for establishing uncommitted tolls. Trans Mountain indicated in its Reply Evidence that intervenors did not account adequately for the risk that Trans Mountain will face over the term of the contracts. Trans Mountain submitted that it has accepted a high level of risk under the proposed toll methodology.

Trans Mountain stated that the Fair Return Standard can be applicable to all regulated tolls that are subject to a just and reasonable standard, including negotiated tolls; however each tolling framework satisfies this standard differently. According to Trans Mountain, the proposed amount of the toll must allow the regulated company a reasonable opportunity to recover its costs and to earn a fair return. In this case, Trans Mountain indicated that the object of the Fair Return Standard is met by a regulator examining the achieved outcome as a whole and determining, on balance, whether the resulting tolls are just and reasonable. Trans Mountain stated that the just and reasonable toll standard is met through considering whether the negotiations process was fair, whether the resulting tolls are not unduly discriminatory, and whether the nature and level of commercial support the end result.

Trans Mountain submitted that the proposed toll methodology provides a negotiated balance of risks that is acceptable to both the committed shippers and the pipeline. Trans Mountain argued that no one element of the achieved settlement can be considered in isolation, and these agreements between highly sophisticated parties and Trans Mountain were negotiated in a transparent and fair Open Season that was conducted at a time when competitive alternatives existed.

5.2.2 Position of Intervenors

Suncor

Mr. Matwichuk, an expert witness for Suncor, completed an analysis of the potential returns Trans Mountain may achieve under the proposed toll methodology, using a set of assumptions. Suncor argued that under the applied-for toll methodology, Trans Mountain's risk is not commensurate with the reward Trans Mountain is seeking. Suncor submitted charts to illustrate that Trans Mountain may achieve a range of return on equity scenarios that would be unjust. According to Suncor, Trans Mountain

would be able to earn significantly higher returns on the low-risk committed volumes and would have the opportunity to increase its returns with uncommitted revenue.

Suncor stated that a competitive market would drive a return on equity to a company's cost of capital and that Trans Mountain has not provided evidence to determine its cost of capital. Suncor noted that Trans Mountain indicated that its tolls will cover all costs. Suncor submitted that Trans Mountain did not provide any quantitative data on how it determined that the tolls would provide it with a reasonable opportunity to recover its costs, including an opportunity to earn a fair return. Suncor also submitted that Trans Mountain did not provide cost details to compute their indicative tolls (initial estimated Firm Service Toll) or to test whether the tolls are just and reasonable. Suncor asserted that the Fair Return Standard was developed in the context of setting just and reasonable tolls and that, in approving a toll, it is expected that the Board would be cognizant that the pipeline is given an opportunity to earn a fair return.

Suncor proposed that the toll issue in this case could be remedied by approving the applied-for toll methodology, subject to a reduction in the first year's toll to achieve an average projected return on equity of 11 percent (11%) on committed volume over the 20-year contract period. Alternatively, the toll proposed for the first year of service could remain as applied-for with the elimination of the 2.5 percent (2.5%) annual escalator to achieve the same outcome. A further alternative would be a combination of a toll reduction and inflator reduction. Suncor stated that such a toll methodology would provide Trans Mountain with a reasonable rate of return and adequately compensate Trans Mountain for the risks it would be assuming through the Expansion under its proposed toll methodology.

Total

Total submitted that the proposed method of calculating tolls is not consistent with the methods used historically or proposed for other pipeline projects. Total stated that Trans Mountain appears to justify a unilateral fee by treating the Expansion as if it were a new pipeline competing with other new pipelines. Total concludes that this comparison is not valid as the risks for a greenfield pipeline are not similar to the risks for the Expansion.

Chevron

Chevron asked that the Board revise Trans Mountain's tolls in the manner suggested by Suncor because it was of the view that Trans Mountain had not provided enough information to justify that its proposed negotiated tolls were just and reasonable and because returns to Trans Mountain appeared excessive.

Statoil, BP Canada, Nexen, and COSP

Some Firm Service Shippers such as Statoil, BP Canada, Nexen and COSP did not contest the proposed toll methodology, including the return that Trans Mountain would earn under the proposed toll methodology. They considered that the FSA and

the TSA represent a commercially negotiated package deal, and any change to the commercial package could jeopardize the project as a whole.

Views of the Board

The Board notes that the proposed toll methodology is not based on cost of service. The applied-for toll methodology is essentially a negotiated agreement allocating risk among parties, which includes gives and takes. Based on the record of this proceeding, the Board was not persuaded that return on equity is a relevant factor in the context of the bilateral negotiations that occurred during the Open Season process, which the Board found to be appropriate and that resulted in the proposed TSA and FSA. A number of economic cycles can be expected to occur over the life of the Expanded System and, the supply and market dynamics of oil transportation to the west coast may change during this time. These cycles and changes will affect the risks and rewards encountered by Trans Mountain. As a result, the approval of the proposed toll methodology will result in a wide range of possible returns for Trans Mountain. Ultimately, the actual return on equity for the Expanded System will depend on how Trans Mountain manages the circumstances and risks of the pipeline over the contract periods.

Under the proposed toll methodology, cost information was neither provided nor required. As a result, it is not necessary for the Board to express a view regarding the likelihood of Trans Mountain recovering prudently incurred costs. If Trans Mountain is prepared to expand its Current System on the basis of the applied-for toll methodology, it is because, in Trans Mountain's own assessment, it will have a reasonable opportunity to recover its prudently incurred costs, including its cost of capital, over the life of the Expanded System. If Trans Mountain believes it has a reasonable opportunity to recover its cost of capital under the proposed toll methodology, the Board is of the view that the requirements of the Fair Return Standard are met.

A company may set its required internal rate of return as it deems appropriate when making its investment decision. The Board does not find this rate to be informative in determining whether tolls are just and reasonable in the current circumstances.

Suncor's evidence, regarding expected returns on equity, used disputed assumptions and was not based on actual cost information. In this proceeding, the Board could not rely on such hypothetical evidence to make its decision because of the wide range of possible outcomes for the future which will depend on different risks materializing. This evidence does not persuade the Board that the applied-for toll methodology would yield tolls that are not just and reasonable or that returns earned by Trans Mountain would be excessive relative to its risks, as Suncor has argued.

Therefore, the Board is not persuaded by Suncor's submission that a reduction to the return on equity is warranted in this case.

Based on the findings expressed in Chapter 4 to the effect that Trans Mountain did not use market power to abuse a potential dominant position when negotiating tolls, the Board is not concerned about the potential return on equity being too high. To provide the relief requested by Suncor would amount to imposing a cost of service approach, at least for the first year of the Expanded System. The record provides no reliable cost evidence to implement such an approach, and this outcome would not reflect the nature of the negotiated agreements.

The Board is not persuaded by Suncor's argument that the Variable Toll Component allows almost any cost to be flowed through to shippers. The Board notes that, while section 3.3 of Schedule C of the TSA and FSA could be interpreted broadly, Trans Mountain limited its interpretation to costs resulting from changes in operations which are not currently anticipated by the carrier or cannot reasonably be included in calculating the toll, including costs resulting from changes in legislation, regulations, orders or directions from any government or Regulatory Body (including the NEB), which result in changes to safety, integrity, environmental practices or procedures, or land use rezoning.

The Board notes that other limited costs could be flowed through as specifically listed in section 3.3. The Board also notes that Trans Mountain is a large, sophisticated pipeline that relied on its extensive experience in estimating the costs to be included in the Fixed Toll Component. As a result, the Board expects that Trans Mountain will benefit from this experience in establishing the Certificate of Public Convenience and Necessity cost estimate in a manner that should minimize unexpected costs arising from the categories referred earlier in this paragraph.

The Board notes that Trans Mountain indicated in its reply evidence that Intervenors did not account adequately for the risk that tax rates might change over the terms of the contracts. The Board accepts Trans Mountain's submission on this point and is therefore of the view that Trans Mountain should be at risk for any changes in tax rates over the terms of the contacts. In the Board's view, clause 3.3 should not be interpreted to be equivalent to a cost of service methodology.

With respect to any adjustments to the Variable Toll Component, the Board expects Trans Mountain to provide its shippers with a clear statement of the adjustments and supporting evidence. The Board notes that the provision for the adjustments to the Variable Toll Component for

uncontrollable costs is similar to provisions agreed to in negotiations undertaken by other carriers.

Trans Mountain acknowledged that pipeline integrity spending can reduce return on capital pursuant to the applied-for toll methodology. Pipeline safety is of paramount importance to the Board and it will take all available actions to protect Canadians and the environment. The NEB requires pipeline companies to anticipate, prevent, manage and mitigate potentially dangerous conditions associated with their pipeline. The Board expects regulated companies to invest the resources required for safe operations, environmental protection and full regulatory compliance at all times. The Board notes Trans Mountain's commitment to continue to maintain the integrity of the pipeline and its safe operation if the proposed toll methodology was approved. Trans Mountain is expected to provide sufficient planning and resources to deliver on its pipeline safety commitments now and during the operation of any Expanded System.

The Board notes Trans Mountain's submission that no element of the agreement may be taken in isolation. The Board is satisfied that Trans Mountain and the Firm Service Shippers reached an agreement that is a package deal negotiated on a willing buyer, willing seller basis. However, in performing its mandate to determine tolls that are just and reasonable, and not unjustly discriminatory, the Board cannot be fettered.

In this case, given that the Open Season was found to be appropriate and considering that Trans Mountain did not use market power to abuse a potential dominant position, the Board concludes that the toll methodology will produce tolls that are just and reasonable and will not be unjustly discriminatory. In reaching this conclusion, the Board was satisfied that the provisions of the agreement and the process leading up to it were appropriate. While not determinative on its own, the Board also gave weight in this case to the fact that 13 large sophisticated parties committed a total of 707,500 bpd on the Expanded System, 11 of which took no issue with the toll methodology.

Chapter 6

Capacity Allocation

Subsection 71(1) of the NEB Act sets out the concept that oil pipelines under the Board's jurisdiction are common carriage pipelines. It states:

> Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.

Oil pipelines are increasingly relying on long-term contracts to support the construction of new facilities. In such a scenario, capacity needs to be allocated in an appropriate manner among Firm Shippers and Uncommitted Shippers to ensure that the pipeline continues to comply with its common carrier obligations. The Board has indicated in the past that the determination of an appropriate level of capacity to be set aside for uncommitted volumes is a matter of judgment and should be based on the circumstances of any specific case. On the Trans Mountain pipeline, both committed and Uncommitted Capacity can be further allocated to Dock and Land Destinations. This Chapter will consider the appropriateness of Trans Mountain's capacity allocation and Rules and Regulations for the Expanded System.

6.1 Position of Trans Mountain

Trans Mountain indicated that 80 percent (80%) of the Expanded System's nominal capacity would be reserved for Firm Service and the remaining 20 percent (20%) would be available for month-to-month uncommitted shipments. This would result in having approximately 712,000 bpd of capacity reserved for Firm Service and 178,000 bpd for uncommitted shipments. Trans Mountain was of the view that its proposal to reserve 20 percent (20%) of the Expanded System nominal capacity for uncommitted volumes, together with a fair Open Season, was consistent with Trans Mountain's common carrier obligation under the NEB Act. According to Trans Mountain, this allocation of capacity would maintain a reasonable balance between the portion of the capacity available for uncommitted service and the need to have long-term contracts with shippers in order to manage risks and underwrite construction of the Expansion.

Trans Mountain submitted that capacity for uncommitted shipments would be further allocated between Dock and Land Destinations with 20 percent (20%) of the uncommitted volumes allocated to the Dock and 80 percent (80%) allocated to Land Destinations. According to Trans Mountain, this allocation of uncommitted volumes reflects the physical limitations of the Westridge Dock and the nominations for Firm

Service from Dock and Land Shippers. While uncommitted land capacity would be reduced from what it currently is if the pipeline were expanded, Trans Mountain indicated that access to overall pipeline capacity for Land Shippers would increase, for both committed and Uncommitted Capacity. In addition, Trans Mountain stated that uncommitted Dock capacity could be redirected to Land Destinations.

Table 6-1 Allocation of Capacity:
Current System and Expanded System

	Current System			Expanded System	
	bpd	%		bpd[1]	%[2]
Committed Dock	54,000			588,000	
Committed Land	0			119,500	
Total Committed	54,000	18%		707,500	80%
Uncommitted Dock	25,000			36,500	
Uncommitted Land	221,000			146,000	
Total Uncommitted	246,000	82%		182,500	20%
Total System	300,000	100%		890,000	100%

Trans Mountain indicated that it has little control over the nomination practices of its shippers, other than to require verification of their supply and capacity to receive deliveries from the pipeline. Trans Mountain indicated that over the past 12 months, nominations to downstream refineries (including the Burnaby refinery and refineries connected to the Puget Sound pipeline) have averaged 85 percent (85%) of the aggregate refining capacity of those facilities.

Trans Mountain submitted that in general, pipeline companies have addressed issues related to shipper nominations through various measures including:

- Setting a maximum volume for nominations;
- Setting verification limits;
- Allocating capacity based on historic use of the pipeline;
- Increasing capacity through the use of drag reducing agents; and
- Limiting commodity characteristics

[1] Committed volumes shown in this column and the resulting uncommitted volumes reflect actual contracts with Trans Mountain. They do not reflect the volumes based on 80 percent (80%) of the total nominal capacity allocated to Firm Service. If this were to be the case, committed volumes would be 712,000 bpd and uncommitted volumes 178,000 bpd.

[2] Percentages in this column reflect proposed allocation of capacity. They do not reflect actual contracting levels.

6.2 Position of Intervenors

Chevron
Chevron asked the Board that no less than 20 percent (20%) of actual capacity, rather than nominal capacity, should be available for uncommitted volumes. As a result, Chevron submitted that if there is an issue with the Trans Mountain system, Firm and Uncommitted Shippers would bear that burden equally.

Chevron also asked the Board that apportionment of light crude and heavy crude should be implemented in a manner such that the proportion of heavy crude would not have an impact on the capacity available for light crude volumes. Chevron was of the view that Trans Mountain had indicated that nominations would be apportioned in such a way but that the applied-for Tariff did not reflect this. Chevron argued that this was important for its Burnaby refinery which is designed to run light sweet crude.

Chevron questioned the sufficiency of capacity being available for Uncommitted Shippers. More specifically, Chevron noted that there is currently 600,000 bpd of refining capacity connected to the Trans Mountain pipeline and while some refiners have signed up for Firm Service, it is not possible to know precisely how many of these refiners have signed up for firm capacity which creates uncertainty on the extent of future competition for Uncommitted Capacity. Chevron also argued that because Trans Mountain has not forecasted monthly apportionment levels and demand for Uncommitted Capacity, this leaves shippers and the Board with no information to suggest there is sufficient Uncommitted Capacity.

6.2.1 Reply of Trans Mountain

In response to Chevron's arguments, Trans Mountain indicated that it has an incentive to maximize capacity on its system. According to Trans Mountain, the Rules and Regulations are designed to manage system allocations while ensuring that pipeline capacity can be maximized even during times of constraint.

Trans Mountain also stated that Rule 14.2(b) of the Rules and Regulations provide for capacity impacts being shared among Firm Shippers and Uncommitted Shippers in the event of *force majeure*. Trans Mountain indicated that the pipeline system would be apportioned in aggregate, and that if the 36-inch pipe is oversubscribed and the 24-inch pipe is at or near capacity, the apportionment of heavy crude would be made at a higher rate than for light crude.

According to Trans Mountain, reserving 20 percent (20%) of actual capacity in combination with a change to the Rules and Regulations to ensure that one line is operated as light and the other one as heavy, even in times of apportionment, would effectively diminish the value of long-term Firm Service commitments. As a result, Trans Mountain was of the view that Chevron's requests related to allocation of capacity would fundamentally change the rights that have been commercially negotiated with Firm Service shippers.

Views of the Board

The Board is of the view that the proposed allocation of capacity between Firm Service and uncommitted service is appropriate. The Board notes that this proposed allocation was not opposed by any party to the proceeding. Allocating 20 percent (20%) of the pipeline capacity to uncommitted service should provide shippers with adequate capacity on a monthly basis while allowing Trans Mountain to secure sufficient long-term firm volumes to support the investment required for the Expansion. The Board is also of the view that the proposed allocation of Uncommitted Capacity between Dock and Land Destinations is appropriate. The Board notes that the Rules and Regulations provide various options, depending on circumstances, for shippers to redirect nominations in order to mitigate potential capacity constraints.

Considering the findings in the above paragraph and the appropriateness of the Open Season discussed in Chapter 2, the Board is of the view that Trans Mountain will respect its common carrier obligations if the allocation of capacity is implemented as proposed on the Expanded System.

The Board was not persuaded by Chevron's argument that the 20 percent (20%) of Uncommitted Capacity should be based on the actual capacity rather than the nominal capacity. In the Board's view, Rule 14.2 (b) of the Rules and Regulations mitigates concerns related to Uncommitted Shippers bearing a disproportionate share of the impacts of a reduction of the pipeline's actual capacity. The Board is of the view that the percentage of Uncommitted Capacity based on the nominal capacity is appropriate.

On the question of apportionment between heavy and light crude volumes raised by Chevron, the Board notes Trans Mountain's submissions to the effect that the Expanded System will be apportioned in aggregate, and that the apportionment of heavy crude would be made at a higher rate than for light crude if the 36-inch pipe is oversubscribed and the 24-inch pipe is at or near capacity. The Board also notes Trans Mountain's submission that the Rules and Regulations are designed to ensure pipeline capacity can be maximized during times of constraints. The Board is of the view that Trans Mountain's approach is sufficient to avoid uncommitted heavy crude nominations to systematically override uncommitted light crude nominations. As a result, the Board will not require the Rules and Regulations to be modified as requested by Chevron.

Based on the views expressed in this Chapter, the Board approves the Rules and Regulations for the Expanded System as proposed by Trans Mountain.

The Board notes that current nominations on the Trans Mountain pipeline are significantly above the capacity of the pipelines feeding downstream, refineries, especially as it relates to the Puget Sound pipeline. The Board also notes that nomination behaviours are affected by shippers competing for scarce capacity. The record of this proceeding did not contain sufficient evidence on the potential for over nominations on the Trans Mountain pipeline and no party raised it as an issue.

Chapter 7

Exemptions

Pipeline companies regulated by the Board are divided into two groups for financial regulation purposes. Group 1 companies are generally identified as those that operate extensive pipeline systems, whereas those with smaller pipeline operations are designated as Group 2. Trans Mountain is designated as a Group 1 company.

The *Toll Information Regulations* require NEB-regulated companies to file quarterly surveillance reports to monitor the financial performance of companies. The Board has exempted Group 2 companies from the *Toll Information Regulations*.

Subsection 5 (1) of the OPUAR requires that:

> Every Group 1 company shall:
> (a) keep separate books of account in Canada in a manner consistent with generally accepted accounting principles;
> (b) unless otherwise authorized or instructed by the Board, keep accounts in the manner set out in these Regulations; and
> (c) keep a system of accounts as prescribed in these Regulations.

This chapter discusses the various exemptions requested by Trans Mountain.

7.1 Position of Trans Mountain

Trans Mountain requested that it be relieved from the filing requirements of the *Toll Information Regulations* and Guide BB of the Filing Manual titled "Financial Surveillance Reports", and from keeping its books in accordance with the provisions of the OPUAR, as they apply to Group 1 companies.

Trans Mountain submitted that the exemption from the OPUAR as they apply to Group 1 companies is warranted on the grounds that the tolls on the Expanded System would not be based on the cost of service methodology and that the Fixed Toll Component will be set for a period of 20 years for both committed and Uncommitted Shippers. Trans Mountain looked to the financial requirements associated with Group 2 pipelines and considered their situation to be very similar. Trans Mountain therefore proposed to provide financial information in accordance with section 5(2)[2] of the OPUAR.

[2] 5(2) Every Group 2 company: (*a*) shall keep separate books of account in Canada in a manner consistent with generally accepted accounting principles until the expiration of one year after such time as the Board grants leave to abandon the operation of the pipeline; (*b*) shall file a set of audited financial statements with the Board within one hundred and twenty (120) days after the end of each fiscal year of the company; (*c*) shall comply with subsections 6(1), (7), (8) and (9); and (*d*) is exempt from complying with these Regulations except as prescribed in paragraphs (*a*) to (*c*).

Trans Mountain indicated that it would file audited financial statements for Trans Mountain Pipeline L.P., the partnership that owns the assets of the Trans Mountain pipeline system. Trans Mountain indicated that the regulated assets of the Trans Mountain pipeline system are in excess of 95 percent (95%) of the asset base in the partnership. Trans Mountain requested that this relief be made contingent on the Expansion facilities being approved under Part III of the NEB Act and to come into effect on the date that those facilities are placed in service.

Trans Mountain confirmed that it is prepared to provide a schedule reporting the results of revenue sharing of Uncommitted Capacity on an annual basis. This schedule would outline the following:

i. Uncommitted Volumes in excess of 85 percent (85%) of the Available Capacity for each month;
ii. Revenues from Fixed Toll Component associated with volumes outlined in (i);
iii. Amount of revenues shared with shippers; and
iv. Impact on the Variable Toll Component of revenue sharing outlined in (iii).

Trans Mountain stated that, after TSAs expire, it will be at risk for the remaining undepreciated capital costs of the Expansion. Trans Mountain also noted that it cannot presuppose what regulatory environment will be in place at that time. Therefore, Trans Mountain will keep books according to regulatory standards. Trans Mountain indicated that it would submit to the Board any changes to its depreciation rates and that approval of the Board would be necessary to implement any change related to them. Thus, if after 20 years, Trans Mountain seeks to revert to cost of service regulation, records will exist to enable such calculations.

Trans Mountain is prepared to file information on:

- Gross plant in service;
- Total asset additions;
- Total asset retirements;
- Annual depreciation expense;
- Net plant in service;
- Annual throughput for both committed and uncommitted volumes.

7.2 Position of Intervenors

CAPP
CAPP stated that filing financial information is an issue of transparency in relation to a large regulated pipeline. CAPP considered that a reasonable amount of transparency of basic cost information is necessary, at least on an annual basis, even where a pipeline is underpinned by firm contracts with a negotiated toll model or is operating under a negotiated incentive agreement, regardless of the contract term.

CAPP took no position on the specific information that Trans Mountain should be required to file but noted that some information, such as rate base, gross and net plant, retirements and additions is foundational information. Annual toll information provided by the regulated pipeline provides assurance that the toll model is operating as intended. CAPP indicated that tolls are always subject to the Board's continuing authority with a potential for review and annual toll information is useful in this regard. In addition, CAPP submitted that toll agreements do come to an end and the ongoing annual filing of a reasonable level of information provides accountability for the day when the pipeline may revert to a more traditional form of toll regulation.

Chevron
Chevron argued that Trans Mountain should not be exempted from the requested filing requirements because there had been insufficient transparency around how Trans Mountain's tolls had been developed. Chevron argued that transparency was required to see the outcomes of the risks, what returns Trans Mountain was making, and so that there was not an information void when the toll methodology comes to an end in the future.

7.2.1 Other Submissions

Ecojustice
In a Letter of Comment, Ecojustice raised concerns regarding access to information for volumes and products shipped on the pipeline. Ecojustice also questioned whether the exemption could affect the Board's oversight and the public interest.

Views of the Board

Exemption from *Toll Information Regulations* and Guide BB of the NEB Filing Manual
The Board notes that the negotiated toll methodology is not based on cost of service. As a result, some of the information required under Guide BB would not be applicable to the Expanded System.

The Board grants the requested relief from the filing requirements of the *Toll Information Regulations* and Guide BB of the NEB Filing Manual for the duration of the contract period, including any renewal allowed under the TSA.

The Board is of the view that the availability of reliable, transparent information regarding throughput and certain revenues contributes to an efficient, well-functioning market. The Board agrees with CAPP that a reasonable amount of transparency of basic cost information is necessary at least on an annual basis regardless of the toll methodology. Also, the TSA and FSA will come to an end and the ongoing annual filing of information regarding rate base can provide accountability for the time when the pipeline may apply for a different form of toll regulation. In light of this, the Board requires Trans Mountain to file the information listed in the attached Toll Order.

The Board expects Trans Mountain to provide sufficient detail to its stakeholders and to the Board regarding the methods and assumptions used to record and report the information requested in the Toll Order.

Trans Mountain stated that the regulated assets of its system comprise the vast majority of the asset base reflected in the audited financial statements of Trans Mountain Pipeline L.P. which Trans Mountain proposes to file. If at any time the regulated assets of the Expanded System represent less than 90 percent (90%) of the asset base in the partnership, Trans Mountain is directed to notify the Board in writing.

Request for Exemption from the OPUAR

The Board is not persuaded that Trans Mountain has provided sufficient evidence to exempt it from keeping its books in accordance with the provisions of the OPUAR, as they apply to Group 1 companies. Trans Mountain is a Group 1 company with an extensive system, capable of moving significant volumes of oil, with numerous third-party shippers. If the Expansion is completed, the impact of these elements is expected to be greater. Notwithstanding the toll methodology, the Board does not find that Trans Mountain would be in a similar situation as a Group 2 company. The Board is not persuaded that there is a sufficient correlation between toll methodology and record keeping to grant the requested exemption from the OPUAR. Therefore, the exemption from the OPUAR as requested by Trans Mountain is denied.

In the current proceeding, Trans Mountain has argued that, pursuant to the negotiated tolls, there is no longer a regulated rate base on which Trans Mountain can earn a regulated rate of return or for which it can seek future cost recovery. Trans Mountain submitted it is at risk for the unrecovered capital when the proposed contracts expire. In the Board's view, this at-

risk position is consistent with the nature of negotiated tolls where the pipeline and shippers agree on a toll independently of the actual costs of building and operating the pipeline. The Board accepts these to be reasonable implications of negotiated tolls and, as a result, is not persuaded that it would be appropriate for the Board to oversee or approve any depreciation rates for the Expanded System. As a result, the Board grants specific exemptions from the OPUAR related to Board approval for depreciation as outlined in the attached Toll Order.

The Board is of the view that it is Trans Mountain's responsibility to depreciate its assets over the term of the committed contracts in a manner that will mitigate the unrecovered capital risk when the proposed contracts expire. Also, the depreciation rates used by Trans Mountain will not impact the tolls on the Expanded System during the contract periods. Therefore, the Board will not approve depreciation rates on the Expanded System during the contract periods.

Appendix I

Toll Order TO-004-2013

ORDER TO-004-2013

IN THE MATTER OF the *National Energy Board Act* (NEB Act) and the Regulations made thereunder; and

IN THE MATTER OF an application by Trans Mountain Pipeline ULC (Trans Mountain) dated 29 June 2012, as amended, pursuant to Part IV of the NEB Act, for approval of a the toll methodology that will apply to service on the expanded Trans Mountain system, if such an expansion is approved in the future, filed with the National Energy Board (NEB or Board) under File No. OF-Tolls-Group1-T260-2012-06 01; and

IN THE MATTER OF Hearing Order RH-001-2012.

HEARD in the city of Calgary, Alberta, on 12, 13, 14, 15, 19, 20 and 21 February 2013.

BEFORE the Board on 23 April 2013.

WHEREAS Trans Mountain filed an application dated 29 June 2012, as amended on 3 July 2012 and 10 January 2013, pursuant to Part IV of the NEB Act, for an Order approving the toll methodology that will apply to the expanded Trans Mountain pipeline system (Expanded System), if such an expansion is approved (Part IV Application);

AND WHEREAS on 25 September 2012, the Board issued Hearing Order RH-001-2012;

AND WHEREAS an oral public hearing was held during which the Board heard the evidence and arguments presented by Trans Mountain and all Intervenors;

AND WHEREAS the Board has considered the letters of comment it has received;

AND WHEREAS the Board's decisions on the Part IV Application are set out in its RH-001-2012 Decision dated May 2013, and in this Toll Order;

AND WHEREAS the Board has noted Trans Mountain's commitment to the ongoing safety and maintenance and integrity of its pipeline;

IT IS ORDERED THAT, pursuant to Part IV of the NEB Act:

1. The toll methodology as applied for in the Part IV Application is approved.

2. The implementation of firm transportation service on up to 80 percent (80%) of the Expanded System's nominal capacity to be provided pursuant to the toll methodology as applied-for in the Part IV Application, including all terms and conditions found in the Facilities Support Agreement, the Transportation Service Agreement (TSA) and the Rules and Regulations, is approved.

3. The reservation of a minimum of 20 percent (20%) of the Expanded System's nominal capacity for uncommitted volumes, and the implementation of uncommitted transportation service to be provided pursuant to the toll methodology as applied-for in the Part IV Application and the Rules and Regulations, is approved.

4. Trans Mountain is exempt from the filing requirements of the *Toll Information Regulations* and the NEB Filing Manual Guide BB for the duration of the contract period, including any renewal allowed under the TSA. However, Trans Mountain is directed to file the following information on an annual basis:

1. Revenue sharing information:
    - 1.1. Uncommitted volumes in excess of 85 percent of the Available Capacity, broken down by month
    - 1.2. Annual revenues from the Fixed Toll Component associated with volumes outlined in (1.1)
    - 1.3. Amount of annual revenues shared with shippers
    - 1.4. Impact on the Variable Toll Component of revenue sharing outlined in (1.3)

2. Rate base information:
    - 2.1. Gross plant in service
    - 2.2. Total additions for the year
    - 2.3. Total retirements for the year
    - 2.4. Annual depreciation expense
    - 2.5. Net plant in service
    - 2.6. Depreciation rates

3. A set of audited financial statements

Trans Mountain is directed to report the following throughput information on a quarterly basis:

4. Actual throughput by committed and uncommitted volumes, by commodity type, broken down by month

5. Trans Mountain is required to keep its books in accordance with subsection 5(1) of the *Oil Pipeline Uniform Accounting Regulations* (OPUAR) as they apply to Group 1 Companies.

6. Trans Mountain is exempt from requiring Board approvals related to depreciation, as provided in subsections 50(2), 52(2)(b), 53(3), 54(5), 55(1), 56(2), and 57(3) of the OPUAR.

7. Trans Mountain shall implement all commitments referred to in its Part IV Application or in its related submissions.

IT IS FURTHER ORDERED pursuant to section 19 of the NEB Act that this Toll Order and specified relief is contingent on the Expanded System's facilities being approved under Part III of the NEB Act and shall come into force if and when the Expanded System's facilities are placed into service.

NATIONAL ENERGY BOARD

Sheri Young
Secretary of the Board

Appendix II

RH-001-2012 List of Issues

The Board has identified the following issues relevant for discussion in the proceeding[3]:

1. Whether the proposed toll methodology for firm and uncommitted transportation service is appropriate in the event nominal capacity of the Trans Mountain pipeline system is increased to approximately 750,000 barrels per day by a future planned expansion;

2. Whether the applied-for terms and conditions found in the Facilities Support Agreement, as amended, and the Transportation Service Agreement are appropriate;

3. Whether the proposed allocation of capacity on the Trans Mountain pipeline system to 80% for firm transportation service and to 20% for uncommitted transportation service is appropriate in the event of a future planned expansion of the Trans Mountain pipeline system;

4. Whether the proposed Rules and Regulations Governing the Transportation of Petroleum on the Trans Mountain pipeline system are appropriate in the event of a future planned expansion of the Trans Mountain pipeline system;

5. Whether the Open Season process was appropriate;

6. Whether, and if so how, the Board should require Trans Mountain to offer firm transportation service to any prospective shippers to the extent those parties' ability to secure firm transportation service has been affected by the Board's decision dated 17 August 2012, pertaining to the application filed by Suncor Energy Products Partnership on 11 May 2012;

7. Whether the Board should exempt Trans Mountain from the filing requirements of the Toll Information Regulations and Guide BB of the NEB Filing Manual, and from certain provisions of the *Oil Pipeline Uniform Accounting Regulations*.

[3] As originally set out in Appendix I of Hearing Order RH-001-2012 issued 25 September 2012.